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In The

Supreme Court of the United States

BAKER BOTTS, L.L.P., et al.,

Petitioners,

v.

ASARCO, L.L.C.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CHAPTER THIRTEEN TRUSTEES AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Chapter Thirteen Trustees ("NACTT") is a non-profit, educational organization composed of consumer bankruptcy professionals.[1] Its membership represents a broad spectrum of participants in the consumer bankruptcy process including debtors' attorneys, creditors' representatives, and chapter 13 standing trustees. The NACTT's voting membership is composed of private trustees appointed by the U.S. Department of Justice, Executive Office of the U.S. Trustee, *see* 28 U.S.C. § 586, and in the federal judicial districts of North Carolina and Alabama by the judiciary. Approximately 98% of the chapter 13 standing trustees in the United States are voting members of the NACTT. Robert B. Wilson, a Chapter 13 Standing Trustee for the Northern District of Texas and current president of the NACTT, and the NACTT's Board of Directors, have directly authorized Henry E. Hildebrand, III, Chapter 13 Standing Trustee for the Middle District of

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[1] Pursuant to Supreme Court Rule 37.2(a), the NACTT states that the petitioner has filed a letter with the Court granting blanket consent to the filing of *amicus curiae* briefs and that the respondent has consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, the NACTT states that no counsel for a party authored this brief in whole or in part and that neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of the brief. The NACTT is a non-profit association and has used its own resources in preparing this brief.

Tennessee, to prepare and submit this *amicus curiae* brief on the NACTT's behalf.

Historically, Congress and federal courts have observed that the more efficient and effective chapter 13 programs are those conducted by chapter 13 standing trustees who exercise a broad range of responsibilities in both the design and effectuation of chapter 13 plans. *See Matter of Maddox*, 15 F.3d 1347, 1355 (5th Cir. 1994). A chapter 13 trustee has a statutory responsibility to participate in the confirmation and administration of every chapter 13 plan. *See* 11 U.S.C. § 1302. A chapter 13 trustee, like bankruptcy trustees in general, is charged with a responsibility to the system and to maximize recoveries to creditors. The trustee is empowered to assert claims, avoid preferences and fraudulent transfers, collect property of the estate, and examine and object to creditors' claims in furtherance of the congressional goal of equitably distributing property of the estate to holders of allowed claims. *Maddox*, 15 F.3d at 1355; *In re Gustav Schaeter Company*, 103 F.2d 237 (6th Cir. 1939). The trustee represents the interests of all creditors by exercising various powers to ensure that the collection of the debtor's disposable income and disbursement of that money to creditors pursuant to a confirmed plan occurs according to the dictates of Congress, as set forth in title 11 of the United States Code (the "Bankruptcy Code"). *Maddox*, 15 F.3d at 1355.

The NACTT and its members offer an important perspective on the issues in this case. The issues

before the court stem from a large business bankruptcy case, but the Court's decision may also affect compensation in consumer bankruptcy cases, including chapter 13 cases. The NACTT and its members are acutely aware of the importance of qualified counsel in chapter 13 cases. The complexity of the body of law in chapter 13 cases makes attorney involvement critical. Any threat to the viability of chapter 13 practice is, therefore, a threat to the chapter 13 system, and because chapter 13 practice generally involves relatively low profit margins on high case volumes, even small reductions in attorneys' fees can affect that viability.

SUMMARY OF THE ARGUMENT

The NACTT agrees with the petitioner that § 330 of the Bankruptcy Code permits courts to award compensation for fees incurred for reasonable litigation of a fee application. The statute provides a broad grant of authority subject to specific prohibitions. The prohibitions do not apply to compensation for the litigation of fee application, and the clear negative implication is that the services are compensable. The NACTT, however, also notes that the statute's restrictions on compensation do not apply to the same degree in chapter 13 cases as in other cases and urges the Court to recognize the distinction between attorneys representing the petitioner and attorneys representing chapter 13 debtors if the Court affirms the Fifth Circuit in this case.

The purposes of § 330 support the petitioner's statutory construction. An overarching goal of the statute since the 1978 Bankruptcy Act has been to ensure qualified professional participation in the bankruptcy system by providing compensation commensurate with the compensation for similar non-bankruptcy-related services. The categorical denial of fees for defending a fee application has the effect of diluting the fees that can be obtained by bankruptcy professionals, thwarting the congressional goal of providing comparable compensation. By allowing objecting parties to force a non-compensable fee award defense, the Fifth Circuit has given such parties the power to force fee applicants into a lose-lose proposition – suffer losses from defending a fee application or accept a fee reduction to avoid the costs. This result is uniquely pernicious in the chapter 13 context, where the fees subject to objection by creditors and others include fees for representing the debtor's interests.

A contextual analysis of § 330 also supports the petitioner's interpretation. Section 330 applies not only in large business bankruptcy cases but also in the consumer bankruptcy cases that represent the large majority of filed bankruptcy cases. An efficient and effective consumer bankruptcy system depends on qualified debtors' attorneys, especially in chapter 13 cases. Unsurprisingly, however, the resources available to compensate debtors' attorneys in chapter 13 cases are limited, and providing fees to attract qualified counsel is challenging. A viable consumer

bankruptcy practice generally involves a high volume of relatively low-fee cases. The margins on these cases are low, so *any* fee dilution presents a meaningful threat. The reality, moreover, is that the costs of any fee defense in chapter 13 cases are likely to be significant in relation to the core fees simply because of the size of the core fees.

The NACTT, therefore, urges the Court to reverse the decision of the Court of Appeals. Even though a chapter 13 trustee, as a party that may contest a fee application, may be placed in a more advantageous position under the Fifth Circuit's holding, the NACTT urges reversal because of the broad impact the holding has on the overall system.

ARGUMENT

I. Section 330 grants implicit authority to award compensation for reasonable litigation of fee applications

The NACTT agrees with the petitioner that § 330 of the Bankruptcy Code implicitly authorizes courts to award compensation for reasonable litigation of fee applications. The NACTT also emphasizes, however, that the restrictions on compensation in § 330(a)(4)(A) do not apply to the same degree in chapter 13 cases as in other cases and urges the Court to recognize the distinctions in any decision affirming the Fifth Circuit in this case.

Section 330 contains a broad grant of authority to award "reasonable compensation for actual, necessary services rendered" by, among others, professional persons employed by a trustee under § 327. 11 U.S.C. § 330(a)(1). The statute provides factors for determining the amount of the reasonable compensation, 11 U.S.C. § 330(a)(3), (4)(B), but it only categorically prohibits compensation for:

> (i) unnecessary duplication of services; or
>
> (ii) services that were not –
>
> (I) reasonably likely to benefit the debtor's estate; or
>
> (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). The clear negative implication of this provision is that services that *are* reasonably likely to benefit the estate or necessary to the administration of the case are compensable. Determining the amount of compensation under § 330 is necessary to the administration of the case, so the costs of reasonable litigation in furtherance of that determination are compensable under § 330.

Section 330(a)(6) is entirely consistent with this interpretation. It provides specific guidance for determining the *amount* of the permissible compensation for preparing a fee application without any express grant of authority to award the fees: "Any compensation awarded for the preparation of a fee application shall be based on the level and skill

reasonably required to prepare the application." 11 U.S.C. § 330(a)(6). The provision, therefore, confirms that the general provisions of § 330 permit fees for the preparation of a fee application. This conclusion undermines the Fifth Circuit's fundamental argument against allowing fees for the defense of a fee application, that § 330(a)(4)(A) prohibits the fees because "[t]he primary beneficiary of a professional fee application is the professional." *In re ASARCO, L.L.C.*, 751 F.3d 291, 299 (5th Cir. 2014). The Fifth Circuit's interpretation would preclude the award of fees for the preparation of a fee application that § 330 clearly permits.

The NACTT, however, also emphasizes the limits of the case before the Court. Section 330(a)(4)(A) applies "[e]xcept as provided in" § 330(a)(4)(B). 11 U.S.C. § 330(a)(4)(A); *see also In re Smith*, 317 F.3d 918, 926 (9th Cir. 2002) ("*[E]xcept for fee awards in Chapter 12 and 13 cases*, the new provision applies to *all* awards of reasonable compensation." (first emphasis added)). Section 330(a)(4)(B) provides authority to award "reasonable compensation to the debtor's attorney" in chapter 13 cases (and chapter 12 cases filed by individuals) "for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section." 11 U.S.C. § 330(a)(4)(B). Courts award debtors' attorneys' fees in chapter 13 cases pursuant to this provision, not § 330(a)(1), which does not authorize compensation to attorneys except attorneys employed to represent the trustee under

§ 327. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534-35 (2004). A holding in this case, therefore, that § 330(a)(4)(A) prohibits an award of fees for the defense of fees would not directly preclude an award of similar fees to a debtor's attorney in a chapter 13 case because § 330(a)(4)(B) limits the effect of the restrictions in § 330(a)(4)(A). Section 330(a)(4)(B) also provides additional support for the award of compensation for the defense of a debtor's attorney's fees in individual chapter 12 and chapter 13 cases. Because the provision authorizes compensation for representing the interests of the debtor, and because the debtor may be responsible for any fees not paid from the estate, the debtor's attorney may be "representing the interests of the debtor," 11 U.S.C. § 330(a)(4)(B), in defending the core fee application.

II. Permitting compensation for reasonable litigation of fee applications in bankruptcy is consistent with the clear goals of § 330

The goals of § 330 support awarding fees for reasonable litigation of fee applications in bankruptcy. As the petitioner explains in detail, § 330 represents a clear policy departure from the "economy of the estate" approach that existed prior to the 1978 Bankruptcy Act, which required attorneys in bankruptcy cases to accept less in bankruptcy cases than they would receive for similar services in other fields. Section 330, instead, aims "to ensure competent representation of debtors by requiring compensation of 'attorneys and other professionals serving in a case

under Title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services' in non-bankruptcy cases." *In re Nucorp Energy, Inc.*, 764 F.2d 655, 658 (9th Cir. 1985) (quoting 124 Cong. Rec. H32, 394 (1978)). *See generally* Timothy S. Springer, *Damned If You Do, Damned If You Don't – Current Issues for Professionals Seeking Compensation in Bankruptcy Cases Under 11 U.S.C. § 330*, 87 Am. Bankr. L.J. 525, 529 (2013). Especially with respect to § 330(a)(4)(B), which authorizes compensation for attorneys representing the interests of individual chapter 12 and chapter 13 debtors, the goals of the statute are also similar to the goals of fee-shifting provisions in consumer protection and civil rights statutes – to address concerns that the cost of counsel would prevent important access to the court system. *See, e.g.*, *Kay v. Ehrler*, 499 U.S. 432, 436 (1991) ("Although [42 U.S.C. § 1988] was no doubt intended to encourage litigation protecting civil rights, it is also true that its more specific purpose was to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights.").

The compensation process under § 330 is a process that has no direct counterpart in non-bankruptcy law. Categorically denying compensation for the fees incurred in this bankruptcy-specific process would dilute bankruptcy fees relative to non-bankruptcy fees. The fees for litigating a fee application are not analogous to the fees a non-bankruptcy professional would incur in suing a client that refused to pay a

bill. A lawsuit to collect a billed amount is a suit to enforce an existing contract. The court's role in this process is primarily to determine the terms of the contract and the parties' performance under the terms. A court reviewing a fee application, in contrast, has the discretion to adjust compensation based on issues that the parties decide non-judicially in the non-bankruptcy context, issues like the reasonableness of the compensation and whether the services involved are beneficial or necessary. *See* 11 U.S.C. § 330(a)(1)(A), (4)(B).

Denying compensation for the reasonable fees of litigating a fee application provides objecting parties undue leverage. It "would allow a litigious objecting party to negotiate unwarranted reductions in a fee award simply because the attorney is faced with a no win situation: even if the attorney fights the objection and prevails, the time and resources spent on the issue often will outweigh the value of the amount in dispute." *Boyd v. Engman*, 404 B.R. 467, 483 (W.D. Mich. 2009). Chapter 13 cases present a unique concern because § 330(a)(4)(B) permits a debtor's attorney to receive fees from the estate for representing the *debtor's* interests (in litigation over exemptions or dischargeability, for example). *See* Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy* § 294.1, at ¶¶ 9-10 (4th ed., sec. rev. June 17, 2004), www.Ch13online.com. Providing creditors in chapter 13 cases a unilateral ability to impose fee reductions on debtors' attorneys would present a destabilizing threat to the attorneys' independence.

The approach of permitting courts to award fees for the reasonable costs of litigating fee applications, the approach implicit in § 330, presents less opportunity for abuse and gamesmanship than the alternative. Any compensation ultimately awarded for fees incurred in litigating a fee application is subject to scrutiny by interested parties and court review. As with the process this Court considered in *Commissioner, INS v. Jean*, "no award of fees is 'automatic'" under § 330. 496 U.S. 154, 163 (1990). The § 330 process, therefore, does not create a meaningful incentive to make unreasonable fee requests – the costs of unreasonable or unnecessary litigation of fee applications are not compensable under any theory. The alternative approach involves much less oversight. If the costs of litigating fee applications were categorically non-compensable, then the only check on coercive practices by objecting parties would be Rule 9011 of the Federal Rules of Bankruptcy Procedure and the courts' inherent authority to shift fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. These protections are likely to be under-inclusive. They place the burden on the party or the court asserting misconduct, and the protections involve substantial uncertainty. Objecting parties subject to these restrictions alone would almost certainly retain undue leverage in the significant gray area surrounding these extraordinary sanctions. Further, the protections apply under either approach. Even if permitting compensation for the costs of reasonable fee litigation did create an opportunity for abuse, courts would have the same ability

to address the behavior under these powers as they would have to address abuses by fee objectors.

III. Routine diminution of attorney's fees would threaten the chapter 13 bankruptcy system

Large business bankruptcy cases, like the case that gives rise to the issues before the Court, represent only a small percentage of bankruptcy filings,[2] and the economics of consumer bankruptcy cases are substantially different than the economics of large business bankruptcy cases. The NACTT urges the Court to interpret § 330 with a recognition of the consumer cases that make up the vast majority of bankruptcy filings.

In the chapter 13 cases that the NACTT member trustees administer, attorney's fees never approach the scale of the fees in this case, but the fees are equally important. Qualified attorneys are vital to the chapter 13 system. The chapter 13 process is

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[2] Cases involving primarily consumer debts far outnumber all cases involving primarily business debts, large and small. For the 12-month period ending September 30, 2014, the Administrative Office of the U.S. Courts reports a total of 935,420 non-business bankruptcy filings (including 623,349 under chapter 7; 1,154 under chapter 11; and 310,914 under chapter 13), compared to only 28,319 business filings. *See* Administrative Office of the U.S. Courts, *Table F-2: U.S. Bankruptcy Courts – Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending September 30, 2014, available at* http://www.uscourts.gov/Statistics/BankruptcyStatistics/2014-bankruptcy-filings.aspx.

extremely difficult to navigate without the assistance of an experienced attorney, and the system functions properly only with the participation of specialized attorneys. The limitations on the funds available to compensate attorneys in these cases, however, already strain the system. Any shift that categorically reduces the fees actually earned by competent counsel presents a threat.

A. An effective and efficient chapter 13 bankruptcy system demands qualified debtors' attorneys

Consumer bankruptcy represents a surprisingly complex area of law. The National Bankruptcy Review Commission concluded in 1997 that "[n]o area of bankruptcy law is more complex than consumer bankruptcy." National Bankruptcy Review Commission, *Bankruptcy: the Next Twenty Years* 79 (1997), *quoted in* Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17, 32 (2012) [hereinafter *Consumer Bankruptcy Fee Study*]; *see also* Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 Am. Bankr. L.J. 483, 494-95 (1997) ("A strong case could be made that the consumer bankruptcy system has outstripped the business bankruptcy system in twists, turns, and complications."). Chapter 13 cases are among the most challenging consumer bankruptcy cases. *See, e.g.*, Joan Feeney et al., *Bankruptcy Law Manual* § 13.5 (5th ed. 2014). The amendments to the Bankruptcy Code in the Bankruptcy Abuse Prevention

and Consumer Protection Act of 2005 ("BAPCPA") only added to this complexity. *See, e.g.*, Lundin & Brown, *supra*, § 387.1, at ¶ 1 (sec. rev. July 3, 2007) (describing the "many new duties" BAPCPA imposed on Chapter 13 debtors, "including many new and changed filing requirements," and noting that some of the new requirements "were scattered to various chapters and sections, not always with any obvious logic").

A competent, compensated attorney to represent the debtor is a necessity in a chapter 13 case. Success rates for unrepresented debtors in chapter 13 cases are dismal. *See* U.S. Bankruptcy Court for the Central District of California, *Access to Justice in Crisis: Self-Represented Parties and the Court* 5 (2011) ("The number of self-represented debtors that manage to get to confirmation of a chapter 13 plan is 0.4 percent – clearly demonstrating that it is nearly impossible for this population to succeed in chapter 13."), *available at* http://ecf-ciao.cacb.uscourts.gov/Communications/prose/annualreport/2011/sectioniib.htm; *see also Consumer Bankruptcy Fee Study*, *supra*, at 81 (reporting that only "0.8% of all chapter 13 cases filed post-BAPCPA that ended with the debtor receiving a discharge were filed *pro se*"). Effective debtors' attorneys benefit not only the debtors, but the entire system; unrepresented parties severely slow down a process that demands efficiency. *See* Lundin & Brown, *supra*, § 93.1, at ¶ 1 (sec. rev. May 24, 2004) ("Pro se Chapter 13 cases are almost always a nightmare for creditors, for the trustee and for the court.").

Chapter 13 cases frequently involve litigation or professional services at various points throughout the case. In many instances, the debtors (or the estate, *see, e.g.*, *Rugiero v. Nationstar Mortg., LLC*, 580 Fed. App'x 376, 378 (6th Cir. 2014)) need representation in non-bankruptcy matters. The chapter 13 estate includes not only any cause of action or lawsuit held by the debtor at filing, *see* 11 U.S.C. § 541(a)(1), but also any such interests acquired during the case, *see* 11 U.S.C. § 1306(a)(1). The length of chapter 13 cases – generally between three and five years, *see* 11 U.S.C. §§ 1322(d), 1325(b)(4) – means that the court approval of compensation under § 330 affects the availability of counsel and professionals for many related matters. Successful resolution of these matters often benefits not only the debtors but their estates. The possibility of systemic dilution of the fees for these services presents a threat to the availability of qualified counsel and professionals.

B. Resource limitations in consumer cases necessitate high-volume practices with low margins and low fees

Despite the complexity of chapter 13 practice, attorneys' fees in chapter 13 cases are generally "modest." Lundin & Brown, *supra*, § 24.1, at ¶ 2 (sec. rev. Mar. 30, 2009). Debtors have limited funds to commit to payment of attorneys, and even the awarded fees are subject to the "unspoken truth that debtors' attorneys rarely collect 100 percent of their fees in Chapter 13 cases." Lundin & Brown, *supra*,

§ 294.1, at ¶ 25 (sec. rev. June 17, 2004). The demands create a pull toward the bankruptcy "mill" model that overemphasizes case volume over quality of representation. *See* Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 Nw. U. L. Rev. 1463, 1531 (2005). Even for the best consumer bankruptcy attorneys, however, efficiency in case management is critical. *See Consumer Bankruptcy Fee Study*, *supra*, at 122 ("Efficiency coupled with a high level of skill, while important in every area of law practice, is crucial to the success of a consumer bankruptcy practice."). The nature of this practice requires relatively high case volumes combined with relatively low fees and low per-case profit margins.

The court below analyzed § 330 primarily through the lens of the large chapter 11 case before it. The court dismissed concerns about fee dilution by noting that the defense fees in the case, though large in absolute terms, amounted to only about 4.4% of the core fees. *In re ASARCO, L.L.C.*, 751 F.3d at 301. In the relatively low-margin consumer bankruptcy context, however, even small percentage reductions in gross revenues can have a significant effect on profitability. In the consumer bankruptcy context, moreover, the absolute fee amounts are much smaller. With typical fee requests measured in thousands, not millions, of dollars,[3] the costs of litigating a fee

[3] The *Consumer Bankruptcy Fee Study* found that the average attorney's fees in post-BAPCPA chapter 13 cases were

(Continued on following page)

dispute in connection with a consumer bankruptcy case are very likely to represent a much larger percentage of the core fee than the 4.4% in this case.

Consumer bankruptcy attorneys are also likely to be especially affected by fee dilution. Because of the efficiency required in a complex area of law, the consumer bankruptcy practice, especially chapter 13 practice, demands specialization. *See* Lundin & Brown, *supra*, § 294.1, at ¶ 24 (sec. rev. June 17, 2004) ("Some of the best Chapter 13 debtors' attorneys operate computerized offices with specialized paralegals who manage a large volume of Chapter 13 cases very efficiently."). Further, many consumer bankruptcy attorneys work in offices that focus narrowly on consumer bankruptcy cases. *See, e.g.*, *Consumer Bankruptcy Fee Study* at 93. For these attorneys, a reduction in fees from bankruptcy cases largely translates into a reduction in their total income. The result is that fee dilution harms the very practices that the system needs most – practices that make the investment necessary to specialize in consumer bankruptcy.

$1,491 in dismissed cases and $2,564 in cases that resulted in a discharge. Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17, 56-57 (2012)

CONCLUSION

For the foregoing reasons, the NACTT requests that the Court reverse the decision of the Court of Appeals.

Respectfully submitted,

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